IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-746 and 72-481

THE PUYALLUP TRIBE, *Petitioner,*

v.

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, *Respondent.*

THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, *Petitioner,*

v.

THE PUYALLUP TRIBE, *Respondent.*

On Writs of Certiorari to the Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE RAMONA C. BENNETT MUCKLESHOOT INDIAN TRIBE SQUAXIN ISLAND TRIBE OF INDIANS NISQUALLY INDIAN COMMUNITY SAUK-SUIATTLE INDIAN TRIBE

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Of Counsel

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Ramona C. Bennett, the Muckleshoot Indian Tribe, the Squaxin Island Tribe of Indians, the Nisqually Indian Community, and the Sauk-Suiattle Indian Tribe

respectfully move for leave to file the attached brief amici curiae in this case. The consent of the Solicitor General, representing the Puyallup Tribe, has been obtained. The consent of the attorney for the Department of Game of the State of Washington has been requested but was refused, although counsel has been assured there will be no opposition to this motion.

The interest of Ramona C. Bennett arises from the fact that she is a member of the Puyallup Indian Tribe and serves on the Puyallup Tribal Council. Further, she is the conditional cross petitioner in No. 72-5437, seeking review of the decision of the Washington State Supreme Court which is here under review. Ms. Bennett had requested that her petition be granted only if the petition of the Department of Game (No. 72-481) should be granted. That petition was granted March 19, 1973, but at the conclusion of the Court's 1973 term, Ms. Bennett's petition was still pending. Ms. Bennett was an intervenor in the remand proceedings below and actively participated through her legal counsel in the superior court and state supreme court proceedings. She is concerned as a Puyallup Indian who fishes herself with being able to exercise treaty fishing rights at the tribe's usual and accustomed places. The extent to which Ms. Bennett, her family, and her fellow tribal members are able to exercise their treaty secured rights free from state infringement may be determined by the Court's decision in this case.

The Squaxin Island Tribe of Indians and the Nisqually Indian Community located in Western Washington are parties to the Medicine Creek Treaty, 10 Stat. 1132, December 26, 1854, to which the Puyallup Indian Tribe is also a party. The Nisqually's fishing rights were the subject of this Court's decision in

Kautz v. *Department of Game* (No. 319) which was consolidated with and decided under the name *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968). The decision of the *Puyallup* case on remand was appealed, decided by the Washington Supreme Court, and is now before the Court in this case.

The Muckleshoot Indian Tribe and the Sauk-Suiattle Indian Tribe are located in Western Washington and are parties to the Treaty of Point Elliott, 12 Stat. 927, January 22, 1855. This treaty and several others negotiated in 1854 and 1855 between the Indian tribes of the Northwest and the United States by Governor Isaac Stevens reserve to the Indian tribes in language virtually identical to that in Article III of the Treaty of Medicine Creek the right to continue fishing at their usual and accustomed places.[1]

To the extent that a decision in this case rests upon an interpretation of the language in the Medicine Creek Treaty relating to fishing, it will affect the rights of each of the amici tribes. They each have several members whose fishing is a vitally important source of food and income for them and their families. In addition, the continued maintenance of their traditional fishing culture is the key to preserving tribal and ethnic identity for these and other Northwest fishing tribes.[2]

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[1] Article III of the Treaty of Medicine Creek provides, in pertinent part,

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . . .

[2] See generally, American Friends Service Committee, *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup and Nisqually Indians* (1970).

The tribes and Ms. Bennett here bring to the Court's attention and discuss the following matters:

1. The reasoning in this Court's decisions relating to other reserved Indian rights is applicable to the treaty reserved Indian fishing right.

2. Tribal and federal regulation of the fishery must be considered before a determination of necessity for conservation (as required by this Court's earlier decision) can be made.

3. Restriction of Indian fishing is "necessary" only after other means of achieving conservation goals are shown to be inadequate.

4. Determinations of conservation necessity should be made (a) in advance of enforcement of state laws, and (b) by a federal court.

The matters discussed in this brief, while consistent with the arguments, which will be advanced on behalf of the Puyallup Tribe, will not be as fully explicated elsewhere.

Respectfully submitted,

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NATIVE AMERICAN RIGHTS FUND
Of Counsel

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BRIEF OF AMICI CURIAE RAMONA C. BENNETT MUCKLESHOOT INDIAN TRIBE SQUAXIN ISLAND TRIBE OF INDIANS NISQUALLY INDIAN COMMUNITY SAUK-SUIATTLE INDIAN TRIBE

INTEREST OF AMICI CURIAE

The interests of amici curiae Ramona C. Bennett, the Muckleshoot Indian Tribe, the Squaxin Island Tribe of Indians, the Nisqually Indian Community,

and the Sauk-Suiattle Indian Tribe are set forth fully in the Motion for Leave to File Brief Amici Curiae which accompanies this brief.

SUMMARY OF ARGUMENT

This Court's earlier decision in this case[1] has prompted diverse interpretations by state and federal courts[2] and by scholars.[3] Articulation of further guidelines for the manner in which courts should make determinations of necessity for conservation—the prerequisite for state regulation of Indian treaty fishing—is needed. In addition to the need for guidelines for treaty interpretation, the prescription of specific procedures for making these determinations in advance of their enforcement is in order.

Amici urge that this Court's treatment of cases requiring determinations of the extent of other reserved rights held by Indians is applicable here. Secondly, because the state has power to regulate only for conservation necessity, the exercise of such power should be as a last resort. Further, it is argued that tribal and federal regulations must be considered before a state

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[1] *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968).

[2] *E.g.*, *Department of Game* v. *Puyallup Tribe*, 80 Wash.2d 561, 497 P.2d 171 (1972); *State* v. *Tinno*, 94 Ida. 759, 497 P.2d 1386 (1972); *State* v. *Satiacum*, 80 Wash.2d 492, 495 P.2d 1035 (1972), *petition for cert. filed*, 41 U.S.L.W. 3301 (U.S., Oct. 15, 1972) (No. 72-552); *State* v. *Moses*, 79 Wash.2d 104, 483 P.2d 832 (1971), *cert. denied* 406 U.S. 910 (1972); *State* v. *Gurnoe*, 53 Wis.2d 390, 192 N.W.2d 892 (1972); *People* v. *Jondreau*, 384 Mich. 539, 185 N.W.2d 375 (1971); *Sohappy* v. *Smith*, 302 F.Supp. 899 (D. Ore. 1969).

[3] See, *e.g.*, Johnson, "The State v. Indian Off Reservation Fishing: A United States Supreme Court Error," 47 Wash.L.Rev. 207 (1972); Comment, "State Power and the Indian Treaty Right to Fish," 59 Calif.L.Rev. 485 (1971).

regulation can be found to be "necessary for conservation." Finally, amici urge that determinations of conservation necessity be made by a federal court before enforcement of state regulations in order to avoid suppression of Indian treaty fishing which later may be declared lawful, and to avoid a great waste of judicial resources.

ARGUMENT

I. The Puyallup Tribe Has a Reserved Right to Fish at Its Usual and Accustomed Places.

The right of Puyallup tribal members to fish at usual and accustomed places outside their reservation boundaries is a right reserved by the tribe, not a right granted to it, in the Medicine Creek Treaty. Just as the tribe reserved certain lands while ceding others, it reserved the right to fish outside reserved lands. While the fishing rights were, by their terms, to be exercised at usual and accustomed places outside reserved lands, the rights being exercised are reserved rights—reservations themselves. Thus, this case must not be seen as a non-reservation case.

The reserved right notion originated with this Court's decision in *Winans* v. *United States,* 198 U.S. 371 (1905), in which interpretation of the same treaty language relative to fishing in a land area not retained by the tribe in its treaty was in issue. The Court held:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed . . . . [T]he treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted. And the form of the instrument and its

> language was adopted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals . . . . They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory."[4]

In order to decide the propriety of state regulation of Indian fishing, it is essential to have clearly in mind the nature and extent of the Indians' right. For this reason, the fact that Indian treaty fishing rights are reserved rights has an important bearing upon any determination of the extent of state regulatory power.

This Court has had occasion to deal with the question of the extent of reserved rights a number of times, especially in the area of Indian water rights. *Winters v. United States*, 207 U.S. 564 (1908), is the leading case on reserved Indian water rights. The Court there held that reserved water rights exist to the extent necessary to fulfill the purposes of the reservation. The *Winters* decision, which was authored by Justice McKenna, who wrote the *Winans* decision three years earlier, has been followed consistently for sixty-five years. For instance, in *Arizona v. California*, 373 U.S. 546 (1963), this Court held that Indian reservations along the Colorado River have a right to sufficient waters from that river to meet all of their present and future needs. This result was required in order to fulfill the purpose of the reservations which was found to be to enable agricultural development by the Indians. Therefore, the measure of the right was the amount of water needed to irrigate all irrigable acreage held

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[4] 198 U.S. at 381.

by the tribes. If that left little or even no water for the white settlers, that was the inevitable consequence of the treaty [6] which, after all, made possible the settlement of the Northwest.

In *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), this Court found that:

> The purpose of creating a reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining, and advance to the ways of civilized life.[7]

In accord with this purpose, the Indians were held to have rights not only to the lands specifically reserved to them, but to the adjacent fishing grounds. In so holding, the Court looked to the circumstances in which the reservation was created including "the power of Congress in the premises, the location and character of the lands, the situation and needs of the Indians, and the object to be obtained."[8]

The purpose of including a clause in each of the treaties negotiated by Governor Isaac Stevens with the several Northwest Indian Tribes in 1854 and 1855 has been discussed in several cases.[9] For instance, this

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[6] 373 U.S. at 600.

[7] See *United States* v. *Ahtanum Irrig. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956), *cert. denied* 352 U.S. 988; 330 F.2d 897 (9th Cir. 1956); 338 F.2d 307 (9th Cir. 1964), *cert. denied* 381 U.S. 924.

[8] 248 U.S. at 89.

[9] 248 U.S. at 87.

[9] The historical dependence of Indians who were parties to the Stevens Treaties upon fishing for their subsistence and livelihood was well articulated by the United States District Court in Oregon:

> From the earliest known times, up to and beyond the time of the treaties, the Indians comprising each of the intervenor

Court has stated, "We are impressed by the strong desire the Indians had to retain the right to hunt and

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tribes were primarily a fishing, hunting and gathering people dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture. They were heavily dependent upon such fish for their subsistence and for trade with other tribes and later with the settlers. They cured and dried large quantities for year around use. With the advent of canning technology in the latter half of the 19th Century the commercial exploitation of the salmonid resource by non-Indians increased tremendously. Indians, fishing under their treaty-secured rights, also participated in this expanded commercial fishery and sold many fish to non-Indian packers and dealers.

During the negotiations which led to the signing of the treaties the tribal leaders expressed great concern over their right to continue to resort to their fishing places and hunting grounds. They were reluctant to sign the treaties until given assurances that they could continue to go to such places and take fish and game there. The official records of the treaty negotiations prepared by the United States representatives reflect this concern and also the assurances given to the Indians on this point as inducement for their acceptance of the treaties.

Sohappy v. *Smith*, 302 F.Supp. 899, 907 (D. Ore. 1969). The Idaho Supreme Court has also taken cognizance of the treaty purposes:

The gathering of food from open lands and streams constituted both the means of economic subsistence and the foundation of a native culture. Reservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaty. Settlement of the west and the rise of industrial America have significantly circumscribed the opportunities of contemporary Indians to hunt and fish for subsistence and to maintain tribal traditions. But the mere passage of time has not eroded the rights guaranteed by a solemn treaty that both sides pledged on their honor to uphold. As part of its conservation program, the State must extend full recognition to these rights, and the purposes which underlie them.

State v. *Tinno, supra*, 94 Ida. at 766, 497 P.2d at 1393.

fish in accordance with the immemorial custom of their Tribes." [10] From these discussions, it is clear that the Indians intended to be able to continue fishing as they had before the treaties in order to maintain their livelihood and cultural identity. Thus, amici submit that the right extends to sufficient fish to meet subsistence and trading needs. No less would fulfill the treaty's purpose.

Of course, the right cannot and should not extend so far as to permit the waste of fish.[11] And it is logical that the right does not permit harvesting fish in excess of the number which safely can be taken consistent with the escapement necessary to perpetuate the resource. Apparently in recognition of this latter limitation, and of the fact that the states are generally charged with management and regulatory power over fish and game within their boundaries,[12] this Court held that "the overriding police power of the State, expressed in non-discriminatory measures for conserving fish resources, is preserved." [13] In order to put to rest any doubt about the manner in which that police power may be exercised, we urge this Court to provide the State of Washington with guidance as to the extent of the treaty rights held by the Puyallup Tribe.

Articulation of the standard by which reserved rights are measured—sufficient to fulfill the purposes of the reservation—will provide the state and the courts with

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[10] *Tulee* v. *Washington*, 315 U.S. 682, 684 (1942).

[11] Compare, *State* v. *Satiacum*, *supra*.

[12] *Geer* v. *Connecticut*, 161 U.S. 519 (1896).

[13] *Puyallup Tribe* v. *Department of Game*, *supra* at 399.

a starting point for understanding the purpose and nature of the federally secured right which they seek to regulate. Misunderstanding of the Indian treaty fishing *right* has led in the past to extensive prohibition of Indian treaty fishing as a means of protecting a fishing *privilege* for other citizens. Amici believe that this state practice violates the Supremacy Clause of the Constitution in that a federal treaty is the supreme law of the land. Further, rights of individual tribal members are violated when their special rights are ignored while citizens without such rights are protected.

II. Tribal and Federal Regulations Must Be Considered in Order to Make a Determination that Enforcement of State Laws Against Indians Is Necessary for Conservation.

This Court has said, most recently in *Puyallup Tribe* v. *Department of Game,* that there is a sphere of permissible state regulation of fishing by Indians with treaty rights. The state power to regulate may be exercised, however, only when it is shown that state regulation is necessary for conservation.[14] Until the effect of other applicable regulatory schemes which may operate upon the fishery is considered, a determination of necessity cannot be made intelligently. This proposition is rooted not only in common sense, but in established legal principles in the case of Indian fishing. Nevertheless, the State of Washington sees its role in regulating fishing within its territory as plenary.[15] Regulation of Indian fishing is reposed in tribal and

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[14] *Id.* at 399 and 401.

[15] See *State* v. *Moses, supra.*

federal authority and the exercise of state power in the area must be seen as supplementary.[16]

To view the state's regulatory jurisdiction over Indians exercising fishing rights reserved by their tribes as primary or exclusive would raise two important, recurring issues. First, it would create an interference with the tribe's ability to govern itself. Second, the federal government's plenary authority, and possible preemptive activity, in the area would be ignored.

The collage of overlapping jurisdictions must be seen against the backdrop of a conservative Congressional attitude toward extension of state jurisdiction over Indian affairs.[17] Where Indians, even outside Indian country, are engaged in transactions over which Congress has asserted its constitutional power, any state interference with the exercise of this power is invalid. For example, Congress in the past has prohibited liquor sales to Indians outside Indian reservations and its exercise of jurisdiction was upheld by the

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[16] *Missouri* v. *Holland*, 252 U.S. 416 (1920), holds that the right of a state to manage game within its boundaries is not infringed by a federal treaty and regulations under it which regulate game within the state in that under the Supremacy Clause the sovereign power of the state must yield to paramount federal power.

[17] This Court has recognized that only express Congressional acts are effective to extend state jurisdiction over Indian country. *Mattz* v. *Arnett*, —— U.S. ——, 41 U.S.L.W. 4808 (U.S., June 11, 1973); *Seymour* v. *Superintendent*, 368 U.S. 551 (1962); see also *McClanahan* v. *Arizona Tax Comm'n.*, —— U.S. ——, 36 L.Ed.2d 129 (1973); *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971).

courts.[18] Regulation of rights secured to Indians under federal treaties a fortiori is an area in which there is a substantial federal interest. To be sure, Congress has dealt jealously with the question of allowing states to extend their jurisdiction over treaty secured Indian fishing rights. For instance, the general statute providing for the assumption of state jurisdiction over Indians specifically prohibits the exercise of state jurisdiction in such a manner as to "deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof."[19]

A. The effect of the tribe's regulatory powers.

An impairment of the tribe's ability to govern its members is the result of confining to the state all regulatory power over the exercise by individual tribal members of rights reserved by the tribe in a solemn

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[18] *Johnson* v. *Gearlds*, 234 U.S. 422 (1914); *Perrin* v. *United States*, 232 U.S. 478 (1914); *Dick* v. *United States*, 208 U.S. 340 (1908); *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876); *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407 (1866). This Court has recognized that federal power in these cases is not unlimited and "does not go beyond what is reasonably essential to their [the Indians] protection, and that, to be effective, its exercise must not be purely arbitrary, but founded on some reasonable basis." *Perrin* v. *United States*, *supra* at 486. Thus, federal power over Indian treaty fishing appropriately extends so far as is necessary to assure fulfillment of the purposes of the treaty.

[19] Public Law 83-280, 18 U.S.C. § 1162. Cf. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), where this Court held that the intention expressed by this phrase in Public Law 83-280 indicates that treaty reserved fishing rights should survive even termination of the tribe. See also *Mattz* v. *Arnett*, *supra*.

treaty with the United States. This is an area in which the Puyallup Tribe has the power to regulate and which it does in fact regulate. The Constitution and By-Laws of the Puyallup Tribe providing for tribal self-government have been approved by the Secretary of the Interior pursuant to the Indian Reorganization Act.[20] The Puyallup Tribe, like many other treaty tribes, has exerted its regulatory powers over the exercise of fishing rights reserved in treaties.[21] Enforcement of the regulations is generally carried out by officers under tribal supervision. Prosecutions are handled in tribal courts with recourse to federal district courts by means of habeas corpus proceedings.[22] Further, fishing in violation of tribal regulations is considered to be outside the scope of the treaty right and thus subjects an Indian so fishing to prosecution for a state fishing regulation he might also be violating.[23]

It is well established that a state may not exercise its jurisdiction over Indians such that it "would un-

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[20] 25 U.S.C. §§ 476 *et seq.* "To assure adequate government of the Indian tribes [Congress] enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs, 4 Stat. 729, 735. Not satisfied solely with centralized government of Indians, it encouraged tribal governments to become stronger and more highly organized. See, *e.g.*, the Wheeler-Howard Act, §§ 16, 17, 48 Stat. 987, 988, 25 U.S.C. §§ 476, 477." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959).

[21] See Tr. 217; see also App. 103. A copy of the tribe's current regulations has been lodged with the clerk by the Solicitor General.

[22] 25 U.S.C. § 1303. See also *Settler* v. *Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969) (habeas corpus from alleged unconstitutional prosecution for violation of tribal off reservation fishing regulations).

[23] *State* v. *Gowdy*, 1 Ore. App. 424, 462 P.2d 461 (1970); 69 I.D. 68, 70 (1962).

dermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[24] Although the case from which this language is taken involved activity between Indians and non-Indians within boundaries of an Indian reservation, it is applicable with even greater force, here where the governing authority of a tribe over its own members exercising a treaty-reserved right is frustrated by the imposition of state authority without any consideration of tribal regulations or the tribe's jurisdiction to regulate. This Court has recently suggested in *McClanahan* v. *Arizona Tax Comm'n, supra,* that treaties be read "with this tradition of sovereignty in mind."[25] To do so demands, at the least, that the state and any reviewing court take into account the effect of tribal regulations in determining whether a state regulation is "necessary" for conservation pursuant to the mandate of this Court's decision in *Puyallup Tribe* v. *Department of Game.*

B. The effect of the federal government's regulatory activity.

A second factor which should be considered in making a determination of the validity of any state regulation of Indian fishing is the extent to which the federal government has occupied the area of regulation. Where the government has a regulatory scheme, no state scheme of regulation operating in the same area is permitted.[26] Here the federal government has pro-

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[24] *Williams* v. *Lee, supra* at 223. See also *Warren Trading Post* v. *Arizona Tax Comm'n,* 380 U.S. 685 (1965); *McClanahan* v. *Arizona Tax Comm'n, supra.*

[25] 36 L.Ed.2d at 136.

[26] See *Warren Trading Post* v. *Arizona Tax Comm'n, supra.*

mulgated regulations for the fishery in question.[27] Just as no exercise of state power inconsistent with the language or purpose of a federal treaty is lawful, neither is the exercise of such power in an area occupied by federal regulation implementing that treaty.[28]

Amici submit that a state must consider federal regulation of the Puyallup fishery before it undertakes to design its regulatory scheme and that it must avoid any conflict between the two. A recognition of the conservation which may be effected by federal regulations, just as those which will be achieved by tribal regulation, will certainly have a bearing on the existence or degree of "necessity" for any state regulations.

III. State Regulation of Indian Treaty Fishing Must be a Last Resort.

A. Restriction of non-treaty fishing must precede regulation of Indian fishing.

Instead of restricting citizen groups greater in number and in political power whose catch of salmonid fish account for the vast majority of fish caught each year, the State of Washington has elected to prohibit or restrict the fishing of a handful of Indians.[29] As the Idaho Supreme Court has recognized, treaty Indians have subsistence and cultural interests in hunting and

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[27] 25 C.F.R. Part 256. The Executive undeniably has the power to develop regulations to implement treaties entered into by the United States.

[28] Cf. *Missouri* v. *Holland, supra.*

[29] The original record in *Puyallup Tribe* v. *Department of Game* reflects the fact that Indian fishermen accounted for between 3 percent and 5 percent of the total catch with the remainder being harvested by non-Indian commercial and sport fishermen. Rs.A-32, 178-79.

fishing that are rooted more deeply than the recreational interests asserted by sportsmen.[30]

Interpreting the earlier decision of this Court in this case, the United States District Court for the District of Oregon held that:

> The state may regulate fishing by non-Indians to achieve a wide variety of management or "conservation" objectives. Its selection of regulations to achieve these objectives is limited only by its own organic law and the standards of reasonableness required by the Fourteenth Amendment. But when it is regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource.[31]

Following this approach, amici submit that occasionally the State of Washington must shift the burdens of its "fishery management" objectives in order to avoid impairing treaty guaranteed Indian fishing rights when restrictions must be imposed on someone to insure perpetuation of fishery resources.[32]

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[30] *State* v. *Tinno, supra*, 94 Ida. at 765, 497 P.2d at 1392.

[31] *Sohappy* v. *Smith, supra* at 908.

[32] This Court has indicated that because the standard by which state power to regulate treaty fishing is necessity for conservation, "the measure of the legal propriety of those kinds of conservation measures is distinct from the federal constitutional standard concerning the scope of the police power of a State." *Puyallup Tribe*

Before a state regulation of Indian treaty fishing can be found to be "necessary," amici submit that it must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes.[33] In order to meet this test, other avenues designed to achieve the conservation objectives must be exhausted. Making regulation of Indian treaty fishing a last resort to protect the resource stands in sharp contrast to the Washington Supreme Court's "Indians last" approach,[34] but is compelled by this Court's direction to that court to determine whether regulations are necessary for conservation.

B. No problems of equal protection are created by imposing stricter regulations upon non-treaty fishermen.

The crux of the argument posited by the Washington State Department of Game before this Court now and at the time this case was first presented is that affording any special treatment in the state regulatory scheme to Indians possessing treaty protected fishing rights would be contrary to the equal protection clause

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v. *Department of Game, supra* at 401, n. 14. Thus, more severe regulation, even prohibition, of non-treaty fishing may be proper. See also *Sohappy* v. *Smith, supra* at 908, 911; *Maison* v. *Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169, 174 (9th Cir. 1963); *Tulee* v. *Washington, supra* at 685.

[33] See *Sohappy* v. *Smith, supra* at 907.

[34] The Washington State Supreme Court held that "the catch of the steelhead sports fishery in the Puyallup River leaves no more than a sufficient number of steelhead for escapement" thus precluding the possibility of an Indian fishery because the river is effectively fished out by sport fishermen. *Department of Game* v. *Puyallup Tribe, supra*, 80 Wash.2d at ——;497 P.2d at 178-179. This approach flaunts the Supremacy Clause as well as *Missouri* v. *Holland, supra*, and this Court's holding in *Puyallup Tribe* v. *Department of Game, supra*.

of the Fourteenth Amendment to the United States Constitution. In continuing to make this contention after this Court's 1968 decision, the state points with confidence to the last sentence of the opinion which mandates that findings "on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with.' "[35] The state position is totally without merit. The Indians' *right* to fish pursuant to treaty must be contrasted to the mere *privilege* of non-treaty fishermen.[36] No other citizens have a right to fish. Numerous courts have considered the identical argument reiterated by this same litigant and have soundly rejected it.[37]

Not only is the argument advanced by the state at odds with existing law, it turns on its head the meaning of this Court's admonition concerning equal protection. The reasonable meaning of the language of the decision is that any violation of the Indians' right to equal protection should be avoided.[38] There are at

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[35] *Puyallup Tribe* v. *Department of Game, supra* at 403. See Appellants Brief, pp. 8, *et seq.*

[36] *Geer* v. *Connecticut, supra* at 532. The extent of paramount reserved Indian rights recognized by this Court is discussed *supra* at p. 5.

[37] See, *e.g.*, *Winans* v. *United States, supra* at 379-381; *Tulee* v. *Washington, supra* at 684; *Department of Game* v. *Puyallup Tribe*, 70 Wash.2d 245, 250, 422 P.2d 754, 757-758 (1957); *Sohappy* v. *Smith, supra* at 905; *Makah Indian Tribe* v. *Schoettler*, 192 F.2d 224, 226 (9th Cir. 1951); *State* v. *Satiacum*, 50 Wash.2d 513, 523-524, 314 P.2d 400, 405 (1957); *Maison* v. *Confederated Tribes of Umatilla Indian Reservation, supra* at 171.

[38] In its opinion, the Court prescribes that state regulations, where shown to be "necessary," may not "discriminate against Indians" (391 U.S. 398), and that only "non-discriminatory measures for conserving the fish resources" are proper (391 U.S. 399). Thus, read as a whole, the thrust of the opinion's equal protection language is clear.

least three distinct ways in which such equal protection violations can and do occur:

a. Recognizing no greater rights in persons with special federally established rights (Indians) than in those without such rights. Equal protection is denied to Indians who are thus unable to obtain the full protection of state law for their rights.

b. Laws which seem fair on their face but which operate to the detriment of Indians. Laws which provide for closure of particular fishing areas or for restrictions on use of certain gear may be reasonable exercises of legislative or administrative discretion and seemingly apply to all persons. However, if they operate to eliminate primarily Indian fishing areas or prohibit fishing with gear used primarily by Indians, the effect is discriminatory.[39]

c. A regulatory scheme which provides for the fulfillment of the needs and objectives of other user groups but which fails to consider Indian needs and the purposes of their treaty reserved rights. Leaving Indians without a classification, effectively excluding them and their needs and rights from the rule making process, while implementing a comprehensive scheme providing for sport and commercial fishing, discriminates against Indians as a class.

IV. A Judicial Determination of Necessity for Conservation Should Precede Enforcement of any State Regulation of Indian Fishing.

A. Advance determinations of conservation necessity will prevent waste of judicial resources and denial of treaty rights.

The requirement "necessary for conservation" implies, as we have already discussed, a last resort. Thus,

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[39] See *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); cf. *Tulee* v. *Washington*, *supra* at 685.

the state must exhaust its regulatory and police powers over citizens whose fishing or other activities (pollution, water diversion, stream bed alteration, damming, etc.) interfere with the goal of preserving the depletable resource before imposing regulations on Indian treaty fishing. If the state then can show to the satisfaction of the court that there is no alternative to regulating the substantially minuscule Indian treaty fishery in order to prevent destruction of the fish resource, and that sufficient regulation is not being provided by the tribe's own regulations or those of the federal government, then state regulation may be approved.

This approach contemplates that because regulation of Indian treaty fishing will not be as a matter of course, it will occur only in extraordinary circumstances. In fact an overall reduction of the present burden on the judicial system caused by numerous Indian treaty fishing rights cases is probable. The great expenditure of judicial resources on Indian fishing rights cases is best illustrated by this case which is now embarking its tenth year of continuous litigation over the legality of regulations for fishing seasons long past. The record in the superior court of Washington comprises several thousand pages representing weeks of courtroom proceedings. Two hearings have been held in the state supreme court resulting in reported decisions filling some seventy-five pages. This is the second time this Court has considered essentially the same issues. And the Puyallup Tribe is only one of more than twenty treaty Indian tribes in the State of Washington having fishing rights on rivers throughout the state.

As serious as the tremendous expenditure of judicial resources may be, the gravest effect of the inefficient

system of judicial review of state regulations after they have reached the enforcement stage is upon the tribe and its fishermen. The decade of this case's pendency has been filled with uncertainty for them. As the record here reflects, the state's position has vacillated considerably and now differs tremendously even as between the Departments of Game and Fisheries. In the meantime, Indians who have dared to fish have suffered arrests, loss of valuable gear, and prosecution. There are numerous criminal cases fought each year against Indians in Washington for illegal fishing in which a treaty defense has been asserted. These cases represent only a fraction of the total number of prosecutions of Indians with treaty fishing rights because a complete assertion of a defense based upon treaty rights requires expensive and lengthy litigation which is beyond the financial capabilities of the average citizen, let alone an impecunious Indian fisherman. As stated by the Washington State Supreme Court at the time of its first consideration of this case:

> A multiplicity of arrests for violation of fishing regulations, which involve the jailing and detention for considerable periods of individuals and consequent hardship to them and their families, seems to us the unnecessarily hard way of determining whether they have immunity from certain fishing regulations.[40]

Amici need not here take exception with the holding of the Washington State Supreme Court in the decision that is here under review that injunction may be a proper remedy to prevent threatened mass violations of regulations which have been determined to be nec-

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[40] *Department of Game* v. *Puyallup Tribe, supra*, 70 Wash.2d at 348, 422 P.2d at 756.

essary for conservation. It is sufficient to urge that the determination of necessity, and hence enforceability must be made by a court in special proceedings for that purpose *before* there is any enforcement or injunction against Indians exercising treaty fishing rights. This would avoid the evils which have resulted in this case—years of Indian treaty fishing prevented by enforcement of state regulations pending a decision on their necessity for conservation. This would depart from the "presumption of validity" which the Washington Supreme Court would attach to administrative determinations of fishing regulations applicable to Indians exercising treaty rights.[41]

B. A federal court is best suited to interpret Indian treaties and to make determinations of conservation necessity for state regulation.

As we have shown, a reserved right is measured in terms of what is needed to fulfill the purposes of the reservation. Thus, the propriety of any state regulation affecting Puyallup Indian fishing at usual and accustomed fishing places must be determined in light of the purposes of the Treaty of Medicine Creek. In determining what these purposes are and whether they are being fulfilled, familiar canons of Indian treaty construction must be employed. This Court has often said that it "will construe a treaty with the Indians as 'that unlettered people' understood it, and as justice and reason demand. . . ."[42]

Agencies of the state government are ill-suited to engage in such treaty interpretation, to say the least. The Washington State Department of Game has evi-

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[41] See *Department of Game* v. *Puyallup Tribe, supra,* 80 Wash.2d at ——, 497 P.2d at 179.

[42] *Winans* v. *United States, supra* at 380.

denced its attitude toward Indian fishing by its consistent refusal to recognize any special Indian treaty fishing rights, even after this Court's earlier decision in this case.[43] The juxtaposition of the obdurate refusal of this state agency, which is charged with promulgating fishing regulations, to accept the fact that there is any Indian treaty fishing right at the tribe's usual and accustomed places, with the tribe's strong, and in this case, justified feeling that it has been inhibited in the exercise of rights guaranteed by a federal treaty, creates a familiar scene in Indian affairs. The situation was well characterized by this Court in *United States* v. *Kagama,* 118 U.S. 375 (1885):

> These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States .... They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies.[44]

In a situation where the exercise of Indian rights is frequently met with hostility, it is unreasonable to expect that regulation of Indian fishing will be even handed. The state's brief presents arguments which purportedly militate against affording Puyallup Indians the fishing rights for which they bargained. At some length the state discusses the value of steelhead as a sport caught fish compared to its value for food, "recreational" and "aesthetic values associated with the sport angling activities," the extent of the Game Department's planting program, and other matters

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[43] See, *e.g.*, Brief for the Department of Game, Appellant, p. 17.

[44] 118 U.S. at 384. Concerning the special problems of Western Washington Indian treaty fishermen see Chapter V, American Friends Service Committee, *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians* (1970).

irrelevant to regulating for conservation. These arguments depart considerably from the touchstone of conservation necessity which this Court found to be a prerequisite for imposition of state regulatory power.

The Washington State Supreme Court seemingly has accepted the administrative agency's reverence for sport fishing in its decision that no Indian fishing will be permitted if all of the fish can be taken by sport fishermen. The state court has consistently upheld the concept of state ownership of game within its boundaries. In a recent case involving the treaty fishing rights of members the amicus Muckleshoot Tribe it stated:

> Fish, while in a state of freedom, are the property of the sovereign power in whose waters the fish are, and the state owns the fish in its sovereign capacity as the representative of and for the benefit of all people in common.[45]

Although this Court has rejected the "ownership" theory as "but a fiction,"[46] the Washington court continues to apply it, even to deny the fishing rights of Indian treaty fishermen.

Enforcement of regulations of Indian treaty fishing in the atmosphere which exists in Washington without a prior court review invites continued deprivation of rights secured by treaty. Such court review is most

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[45] *State* v. *Moses, supra,* 79 Wash.2d at 113, 483 P.2d at 837. This proposition was recently reaffirmed by the state supreme court in a case not involving Indian fishing, but citing *Moses* with approval. *Washington Kelpers Ass'n* v. *State of Washington,* 81 Wash.2d 410, 502 P.2d 1170 (1973), *cert. denied* —— U.S. ——, 41 U.S.L.W. 3608 (U.S. May 14, 1973).

[46] *Toomer* v. *Witsell,* 334 U.S. 385, 402 (1948).

appropriately the task of a federal court. The interposition of the federal judiciary in the state administrative process where Indian treaty secured fishing rights are involved is entirely appropriate: interpretation of the effect of treaties with the United States is a federal question.[47] This is true no less with Indian treaties than it is with international treaties. And federal jurisdiction over rights reserved by Indian tribes in treaties with the federal government are matters with which the federal judiciary is particularly concerned. Thus, the forum for determining the propriety of state fishing regulations should be a federal court. Reposing this task in a federal court will contribute to a resolution of the problem of overlapping regulatory jurisdiction as between tribal, federal and state governments and will result in an overall reduction in court congestion.

CONCLUSION

The holding of the Washington State Supreme Court relegating Indians having special treaty fishing rights to a position subordinate even to persons without such rights, and allowing a total prohibition of Indian net fishing for steelhead, should be reversed. As the su-

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[47] 28 U.S.C. §§ 1331 and 1362 provide Indians with access to federal courts in cases arising "under the Constitution, laws, or treaties of the United States." Cf. *Great Lakes Inter-Tribal Council* v. *Voight*, 309 F.Supp. 60, 64 (W.D. Wis. 1970) where the court stated:

> To require exhaustion of state remedies, or to abstain from the exercise of jurisdiction until the state has undertaken to clarify the applicability of its fish and game laws to plaintiffs on Indian lands, would be to dilute the Congressional intention to provide Indians with a federal forum for just such questions as those presented here.

perior court found, there was no showing by the state that the prohibition of Indian fishing was necessary for conservation. Any showing that a new state regulation restricting Indian fishing is necessary for conservation requires that there be a determination prior to enforcement that:

1. Conservation needs will not be met by tribal or federal regulations;

2. Regulation of Indians is a last resort after state attempts to meet conservation needs by the exercise of its regulatory powers over others.

Amici specially ask that this Court take notice of the gross deprivation of fishing rights which results from continued enforcement of state regulations which restrict Indian treaty fishing during prolonged litigation challenging those regulations. To avoid this unconscionable result, prior court approval of such state regulation should be required. The courts with unquestionable jurisdiction to do the job are the federal courts.

Respectfully submitted,

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